

Message

From: Starfield, Lawrence [Starfield.Lawrence@epa.gov]
Sent: 10/13/2020 10:35:12 PM
To: Kelley, Rosemarie [Kelley.Rosemarie@epa.gov]
Subject: RE: Lawsuit regarding Jeff Clark's Private Party SEP Memo

Thanks.

From: Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>
Sent: Tuesday, October 13, 2020 6:17 PM
To: Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Cc: Koslow, Karin <Koslow.Karin@epa.gov>; Denton, Loren <Denton.Loren@epa.gov>
Subject: FW: Lawsuit regarding Jeff Clark's Private Party SEP Memo

Larry—

Here is some additional information about the SEP lawsuit.

Rosemarie

From: Makepeace, Caroline <Makepeace.Caroline@epa.gov>
Sent: Friday, October 09, 2020 12:48 PM
To: Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Koslow, Karin <Koslow.Karin@epa.gov>; Denton, Loren <Denton.Loren@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; BERMAN, TESSA <Berman.Tessa@epa.gov>
Subject: Lawsuit regarding Jeff Clark's Private Party SEP Memo

Just an FYI re the lawsuit filed yesterday re the DOJ SEP memo, by the Conservation Law Foundation in MA, and Democracy Forward. Here are links to the [press release](#) and [complaint](#), sent to us by OGC staff. And below, a Bloomberg article which includes thoughts from Buente and Traylor on the viability of the suit.

DOJ Sued Over Ending Use of Projects to Settle Pollution Claims

Oct. 8, 2020, 4:34 PM

- **COURT:** D. Mass.
- **TRACK DOCKET:** No. 1:20-cv-11827 (Bloomberg Law Subscription)

The Department of Justice has unlawfully scuttled its longstanding practice of allowing companies to complete environmental projects to settle claims of pollution-related violations, a conservation group says in a lawsuit filed Thursday in Massachusetts federal court.

The lawsuit, filed in the U.S. District Court for the District of Massachusetts, centers on a memo issued by Assistant Attorney General Jeffrey Clark in March that ended the use of supplemental environmental projects in federal consent decrees.

Clark, who leads the department's Environment and Natural Resources Division, said SEPs "divert cash from the Treasury to third parties" in violation of the Miscellaneous Receipts Act.

His finding not only misreads the act and the Environmental Protection Agency's SEP policy, but also DOJ's own conclusions on settlements such as SEPs, according to the Conservation Law Foundation's complaint.

SEPs are only allowed before a finding of liability, and before a settlement no agreement has been reached between the parties on the precise amount of civil penalties, the group says.

The EPA doesn't "forgo" higher penalties when it considers a settlement because those penalties didn't exist, according to the lawsuit. And because the government can't receive funds that don't exist, the SEP process is compatible with the act, the group says.

The memo doesn't explain why an alleged polluter's expectation of lowered penalties, if it exists, is appropriate for determining when funds are "obligated to the Treasury," according to the lawsuit. That type of consideration is "too attenuated to establish constructive receipt of Treasury funds," the group says, citing the Office of Legal Counsel.

The memo will reduce relief available to communities suffering the effects of pollution, the lawsuit says.

"Poor and minority communities—those whom the assistant attorney general considers inappropriately 'blessed' by SEPs—will bear the brunt of these effects, which the memorandum ignores," according to the complaint.

David Buente Jr., an attorney at Sidley Austin LLP, told Bloomberg Thursday the case is unlikely to succeed both because the issue hasn't been properly raised in the context of an actual controversy and a recent series of cases have held federal agency enforcement decisions are exempt from review under the Administrative Procedure Act.

"And if Biden wins, the Clark memo presumably goes to the shredder," Buente said, referring to former Vice President Joe Biden's run for president.

Patrick Taylor, an attorney at Vinson & Elkins, echoed Buente's concerns Thursday.

"In the same way that opponents of SEPs would have had a hard time in the past using the APA to challenge their use, these supporters of SEPs will have a hard time using the APA to challenge their disuse," he told Bloomberg.

—With assistance from Ellen Gilmer

Cause of Action: Administrative Procedure Act.

Relief: Declaratory and injunctive relief; an order vacating the memo; attorneys' fees and costs.

Response: The Department of Justice didn't immediately respond to a request for comment. The EPA directed inquiries to DOJ.

Attorneys: The Conservation Law Foundation represents itself.

The case is Conservation Law Found. Inc. v. Barr, D. Mass., No. 1:20-cv-11827, 10/8/20.

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